**DUIS AKIM & ORS** A

**v.**

**PP**

FEDERAL COURT, PUTRAJAYA B
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
JEFFREY TAN FCJ C
[CRIMINAL APPEAL NO: 05-14-01-2012(S)]
18 OCTOBER 2013

***EVIDENCE:*** *Identification evidence - Sole eye-witness - Whether identification of accused of good quality and satisfied Turnbull guidelines - Whether trial judge erred in doubting identity of accused at end of defence's case after finding identity proven at end of prosecution's case - Whether disparity between actual appearance of accused and photo-fits could be basis to doubt positive identification evidence of eye-witness - Whether positive eye-witness identification of accused sufficed to demolish alibi defence* D E

The Court of Appeal overturned the High Court's decision to acquit and discharge the appellants of a charge of murdering a 23-year-old man ('the deceased') and convicted and sentenced them to death. The appeal court held that in doubting the identity of the appellants as being the assailants of the deceased at the end of the trial, the trial judge contradicted his earlier ruling at the end of the prosecution's case that their identity had been positively proven by the sole eye-witness in the case, PW1. The Court of Appeal also held that the trial judge erred in sustaining the first and second appellants' alibi defence although it went against the weight of the evidence. In acquitting the appellants, the High Court had held that the non-resemblance of the appellants to the photo-fits drawn of them based on the descriptions given by PW1 cast doubt on the identity of the appellants. The court also held that the prosecution had failed to adduce any forensic evidence to link the appellants to the murder or to show that they had common intention to commit the crime and that the defence of alibi had been established. According to PW1's testimony, the appellants came into a 7-Eleven store where he worked in the F G H I

A wee hours one morning armed with *parangs* and demanded that they be given the money from the cash register. They assaulted the deceased, who was at the storeroom area, first before they turned upon PW1. The deceased died of multiple stab wounds. PW1 testified that he had 'a good five-minute look' at the faces B of the appellants and was able to recognise them in a police identification parade after they were arrested about a month after the incident. Apart from PW1's testimony, there was no evidence of a murder weapon whilst the forensic evidence of blood samples and cigarette butts taken from the murder scene was inconclusive C to implicate the appellants. The appellants admitted that they went to the vicinity of the store earlier that night but claimed that at the time of the murder they were already home. To support that contention, they called as witnesses, four friends who were with them that night as well as the first appellant's sister, DW2.

D

**Held (dismissing appeal; affirming convictions and sentences of the Court of Appeal)**
**Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:**

E

**(1)** After having factually found, at the end of the prosecution's case, that PW1 had positively identified the appellants, the trial judge erred in reversing that initial finding at the end of the case. And he did it even though the defence had not adduced any evidence to rebut the positive finding on their F identification. (paras 44, 45 & 46)

**(2)** In making his initial ruling that the appellants had been positively identified by PW1, the trial judge must have been satisfied with the accuracy and quality of the identification. G He relied on the fact that PW1 had had a good five-minute look at the faces of the appellants. The other contributing factors to the good quality of the identification were that: the persons who entered the store that morning were not masked; the lighting in the store was bright; the persons who pointed H *parangs* at PW1 must have been very near him; PW1's view of the persons who entered the store was not impeded or obstructed; PW1 had more than a fleeting glance; his evidence on the identification of the appellants was unshaken under intensive cross-examination; PW1 had no reason or motive to I implicate the appellants; and the identification parade was conducted within a month after the incident. (paras 49 & 50)

**(3)** The trial judge gave too much weight on the apparent inconsistent descriptions of the appellants in the photo-fits. The fact that a photo-fit was unlike a photograph or video, which was real evidence, meant that little weight should be attached to its use as means of identification evidence in a court of law. In any case, the trial judge had the photo-fit before him at the end of the prosecution's case; yet he called for the defence. He did not, at that time, find the photo-fit to have contradicted the positive identification of the appellants by PW1. (paras 52, 62 & 63)

**(4)** Having considered the evidence adduced on the identification of the appellants in the light of the *Turnbull* guidelines, the court was satisfied beyond reasonable doubt that the appellants had been positively identified as the persons involved in the killing of the deceased. (para 79)

**(5)** As it was the finding of the trial judge, with which this court agreed, that the appellants had been positively identified by PW1, the alibi defence of the first and second appellants collapsed. And since the third appellant did not rely on alibi, his defence of bare denial in the commission of the offence collapsed as well. (paras 84 & 85).

**(6)** The trial judge accepted the evidence of the defence witnesses as to alibi wholly without reservation and without indicating his reasons for believing their testimonies. He did not consider that those witnesses were with the appellants that fateful night and that DW2 was the first appellant's sister. On close scrutiny of the evidence of those witnesses, there were glaring discrepancies. Their accounts contradicted in crucial and material particulars especially on the time factor which was at the core of the alibi defence. Each of them gave a different time of their arrival home that night. None of them appeared to know, or told the truth, of their arrival time. With regard to DW2, the trial judge was too lenient in accepting her testimony on the alibi defence. (paras 94, 96, 97, 98 & 103).

**(7)** It was not disputed that the appellants with four others went to the vicinity of the store on the night of the murder. They said they were there earlier and before the alleged time of the murder. By that time they claimed they were already home. It was therefore mainly a question of time and not that the appellants were never in the vicinity of the store. (para 91)

**(8)** On analysing and considering the defence and the evidence adduced as a whole, the court found that the defence had not cast a reasonable doubt on the prosecution's case and that the prosecution had proved its case beyond reasonable doubt. (para 109)

***Bahasa Malaysia*** *Translation Of Headnotes*

Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dalam melepaskan dan membebaskan perayu-perayu daripada pertuduhan membunuh seorang lelaki berumur 23 tahun ('si mati') dan mensabitkan dan menjatuhkan hukuman mati ke atas mereka. Mahkamah Rayuan memutuskan bahawa dengan meragui identiti perayu-perayu sebagai orang yang menyerang si mati di akhir perbicaraan, hakim bicara menyanggah keputusannya yang terdahulu di akhir kes pendakwaan bahawa identiti mereka telah dibuktikan secara positif oleh satu-satunya saksi dalam kes ini, PW1. Mahkamah Rayuan juga memutuskan bahawa hakim bicara terkhilaf dalam mengekalkan pembelaan alibi perayu pertama dan kedua walaupun ia bertentangan dengan beban keterangan. Dalam melepaskan perayu-perayu, Mahkamah Tinggi memutuskan bahawa ketiadaan persamaan perayu-perayu dengan fotofit mereka yang dilukis berdasarkan gambaran yang diberikan oleh PW1 menyebabkan keraguan terhadap identiti perayu-perayu. Mahkamah juga memutuskan bahawa pihak pendakwaan telah gagal mengemukakan apa-apa keterangan forensik untuk mengaitkan perayu-perayu dengan pembunuhan tersebut atau untuk menunjukkan bahawa mereka mempunyai niat bersama untuk melakukan jenayah tersebut dan bahawa pembelaan alibi mereka telah dibuktikan. Menurut keterangan PW1, perayu-perayu telah datang ke kedai 7-Eleven di mana dia bekerja pada awal pagi bersenjatakan parang dan menuntut diberikan wang dari dalam daftar tunai. Mereka menyerang si mati, yang berada di kawasan setor dahulu, sebelum mereka beralih kepada PW1. Si mati meninggal dunia akibat luka tikaman berganda. PW1 memberikan keterangan bahawa dia ada 'a good five minute look' terhadap muka perayu-perayu dan boleh mengenali mereka dalam kawad cam polis selepas mereka ditangkap sebulan selepas kejadian tersebut. Selain daripada keterangan PW1, tidak ada keterangan senjata bunuh sementara keterangan forensik contoh darah dan puntung rokok yang diambil daripada tempat pembunuhan tidak muktamad dalam membabitkan perayu-perayu. Perayu-perayu

mengakui bahawa mereka telah pergi ke kawasan setor sebelum itu pada malam tersebut tetapi menyatakan bahawa pada masa pembunuhan tersebut mereka telah pun berada di rumah. Untuk menyokong hujahan mereka, mereka memanggil sebagai saksi, empat orang rakan mereka yang berada bersama mereka pada malam tersebut dan juga adik perempuan perayu pertama, DW2.

**Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Rayuan)**
**Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:**

**(1)** Selepas mendapati sebagai fakta, di akhir kes pendakwaan, bahawa PW1 telah mengenal pasti perayu-perayu secara positif, hakim bicara terkhilaf dalam mengakas dapatan pertama tersebut di akhir kes. Dan beliau berbuat demikian walaupun pihak pembelaan tidak mengemukakan apa-apa keterangan untuk mematahkan dapatan positif tentang pengenalpastian mereka.

**(2)** Dalam membuat keputusan awal bahawa perayu-perayu telah dikenalpasti secara positif oleh PW1, hakim bicara sepatutnya berpuas hati dengan ketepatan dan kualiti pengenalpastian tersebut. Beliau bersandarkan pada fakta bahawa PW1 mempunyai masa lima minit yang baik untuk memerhatikan rupa perayu-perayu. Faktor-faktor lain yang menyokong kualiti baik pengenalpastian adalah: orang yang memasuki kedai tersebut pada pagi itu tidak bertopeng; lampu di kedai tersebut adalah cerah; orang-orang yang mengacukan parang kepada PW1 mungkin berada hampir dengannya; penglihatan PW1 terhadap orang-orang yang memasuki kedai tersebut tidak dihalang atau disekat; PW1 mendapat lebih daripada sekilas pandang; keterangannya mengenai pengenalpastian perayu-perayu tidak digugat di bawah pemeriksaan balas yang bertubi-tubi; PW1 tidak mempunyai alasan atau motif untuk membabitkan perayu-perayu; dan kawad cam dibuat dalam tempoh sebulan selepas kejadian.

**(3)** Hakim bicara telah memberikan penekanan yang lebih kepada gambaran tidak konsisten yang jelas mengenai perayu-perayu dalam fotofit. Fakta bahawa fotofit tersebut bukan seperti foto atau video yang merupakan keterangan sebenar, bermaksud bahawa penekanan yang kurang sahaja yang perlu diberikan

terhadap penggunaannya sebagai cara keterangan pengenalpastian di mahkamah undang-undang. Walau apa pun, hakim bicara mempunyai fotofit tersebut di hadapannya di akhir kes pendakwaan; tetapi pembelaan dipanggil. Beliau tidak, pada masa tersebut, mendapati fotofit tersebut bercanggah dengan pengenalpastian positif perayu-perayu oleh PW1.

**(4)** Selepas mempertimbangkan keterangan yang dikemukakan mengenai pengenalpastian perayu-perayu mengikut panduan *Turnbull*, mahkamah berpuas hati melampaui keraguan munasabah bahawa perayu-perayu telah dikenalpasti secara positif sebagai orang yang terbabit dalam membunuh si mati.

**(5)** Oleh sebab ia adalah dapatan oleh hakim bicara, yang mana mahkamah ini bersetuju, bahawa perayu-perayu telah dikenalpasti secara positif oleh PW1, pembelaan alibi perayu pertama dan kedua gagal. Dan oleh sebab perayu ketiga tidak bersandarkan pada alibi, pembelaannya yang merupakan penafian semata-mata dalam melakukan kesalahan tersebut juga gagal.

**(6)** Hakim bicara menerima keterangan saksi-saksi pembelaan tentang alibi secara menyeluruh tanpa ragu-ragu dan tanpa menyatakan alasannya mempercayai keterangan mereka. Beliau tidak mempertimbangkan bahawa saksi-saksi tersebut berada dengan perayu-perayu pada malam tersebut dan bahawa DW2 adalah adik perempuan perayu pertama. Atas penilaian teliti keterangan saksi-saksi tersebut, terdapat percanggahan yang jelas. Pernyataan mereka bercanggah dalam butir-butir penting dan material khususnya mengenai faktor masa yang merupakan akar umbi pembelaan alibi tersebut. Setiap seorang daripada mereka memberikan masa yang berbeza bagi ketibaan di rumah pada malam tersebut. Tidak seorang pun daripada mereka yang tahu, atau menyatakan yang benar, mengenai masa ketibaan mereka. Berkaitan dengan DW2, hakim bicara terlalu longgar dalam menerima keterangannya mengenai pembelaan alibi.

**(7)** Tidak dipertikaikan bahawa perayu-perayu bersama-sama dengan empat yang lain pergi ke kawasan kedai tersebut pada malam pembunuhan tersebut. Mereka menyatakan bahawa mereka berada di sana pada awalnya dan sebelum masa pembunuhan yang didakwa. Sebelum masa tersebut, mereka mendakwa mereka telah tiba ke rumah. Oleh itu, ia adalah persoalan masa dan bukan bahawa perayu-perayu tidak pernah berada di kawasan berhampiran kedai tersebut.

**(8)** Selepas menganalisa dan mempertimbangkan pembelaan dan keterangan yang dikemukakan secara keseluruhannya, mahkamah mendapati bahawa pihak pembelaan tidak membangkitkan keraguan munasabah ke atas kes pihak pendakwaan dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

**Case(s) referred to:**
*Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC* ***(refd)***
*Dorai Pandian Munian & Anor v. PP [2012] 10 CLJ 22 CA* ***(refd)***
*Hamidon Mat Yatim v. PP [1995] 3 CLJ 724 HC* ***(refd)***
*Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA* ***(refd)***
*Heng Aik Ren Thomas v. PP [1998] 3 SLR 465* ***(refd)***
*K S Roberts v. PP [1970] 1 LNS 44 HC* ***(refd)***
*Leve v. S (CA&R 163/12) [2013] ZAECGHC 5 (31 January 2013) (South Africa)* ***(refd)***
*Lizotte v. The King [1950] CanLII 48 (SCC); [1951] SCR 115* ***(refd)***
*Mutachi Stephen v. Uganda ([2003] UGCA 9)* ***(refd)***
*Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC* ***(refd)***
*PP v. Hanif Basree Abdul Rahman [2007] 2 CLJ 33 CA* ***(refd)***
*PP v. Dato' Mokhtar Hashim & Ors [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 HC* ***(refd)***
*PP v. Khong Soh [1966] 1 LNS 141 HC* ***(refd)***
*PP v. Shafarin Zainal Abidin & Anor [2007] 7 MLJ 474*
*R v. Hlongwane 1959 (3) SA 337* ***(refd)***
*R v. Letourneau [1994] Can LII 445 (BC C.A)* ***(refd)***
*R v. Ryan [1990] Crim LR 50* ***(refd)***
*R v. Turnbull & Ors [1976] 3 All ER 549* ***(refd)***
*Regina v. Youssef [1990] 50 A Crim R 1* ***(refd)***
*S v. Charzen [2006] SCA 6* ***(refd)***
*S v. Liebenberg [2005] (2) SACR 355* ***(refd)***
*Syed Abdullah v. PP [1963] 1 LNS 133 HC* ***(refd)***
*Tan Buck Tee v. PP [1961] 1 LNS 130 HC* ***(refd)***
*Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC* ***(refd)***
*Thirumalai Kumar v. PP [1997] 3 SLR 434* ***(refd)***
*Ye Wei Gen v. PP [1999] 4 SLR 101* ***(refd)***
*Zulkifli @ Sakun Ahmad Endin Chun lwn. PP [2012] 1 LNS 435 CA* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 402A
Penal Code, s. 34

A *For the first appellant - Ram Singh; M/s Ram Singh & Co*
*For the second appellant - Yunof Maringking; M/s Maringking & Co*
*For the third appellant - Chau Chin Tang (Noriah Nahalan with him); M/s Chau & Thien*
*For the respondent - Awang Armadajaya Awang Mahmud, DPP*

B *[Appeal from Court of Appeal, Kota Kinabalu; Criminal Trial No: S-05-57-2007]*

*Reported by Ashok Kumar*

C

## JUDGMENT

**Richard Malanjum CJ (Sabah & Sarawak):**

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### Introduction

**[1]** The charge against the appellants reads:

> That you all, on the 26th day of May, 2001 at about 2.00 am at a Seven Eleven Shop, Donggongon Town, in the District of Penampang, in the State of Sabah, in furtherance of common
E intention did commit murder by causing the death of one WELFRED BIN THOMAS (M) 23 years, Dusun and that you all have thereby committed an offence punishable under Section 302 of the Penal Code (F.M.S. Cap 45) read together with section 34 of the same Code

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**[2]** The appellants are dissatisfied with the decision of the Court of Appeal setting aside their acquittals by the learned High Court Judge ('learned trial judge') and convicting them of the offence as charged and sentencing them to death. They are appealing to this
G court on several grounds. We heard the arguments. We took time to consider all the issues raised by both sides. We have now come to our decision. This is therefore the judgment of the court.

### Brief Factual Background

H **[3]** It was the testimony of PW2 ('Robert Majantim') that in the early morning of 26 May 2001 he went to the 7-Eleven store ('the store') at Donggongon Town, Penampang. On arrival, he saw the cash register wide open and blood on the floor. He then saw PW1 ('Osmund David') lying on the floor near the door to the
I store room of the store covered with blood but still alive. He

asked to be sent to hospital. He was clutching the telephone of the store on the desk in the storeroom. He saw another person lying inside the storeroom who was also covered with blood and motionless. A

**[4]** As the police station was nearby PW2 said that he asked his wife to call the police. Unfortunately she failed to contact the police station. Meanwhile PW2 saw a white vehicle pickup passing by. He stopped it and asked the driver to inform the police. B

**[5]** Soon after the police came to the store. PW1 ('Osmund David') was taken to hospital together with the other person in the store room. C

**[6]** A post mortem was carried out on 28 May 2001 at the Queen Elizabeth Hospital on the cause of death of the person PW2 saw in the storeroom. In his report the pathologist concluded that the death of the deceased, WELFRED BIN THOMAS (M) ('the deceased'), was caused by multiple stab wounds (12 stabs in total) over the neck and upper back. D

**[7]** The star witness called by the prosecution was PW1. He had survived in the attack. It was his evidence that he had a look at the appellants for at least five minutes when they came to the store. He also identified them during the identification parade ('IP') conducted by the police about a month after the incident. E

**[8]** Besides the testimony of PW1 linking the appellants to the murder, there was no other eyewitness who saw the commission of the crime. The results in the forensic investigation were also not much of help to the prosecution. F

**[9]** The blood samples taken from the blood trail that ran from the store to the outside transformer station nearby were tainted and thus not suitable for analysis. The same went with the cigarettes buds collected at the vicinity. An examination of the van allegedly used and searches for blood stained clothes of the appellants proved futile as well. No murder weapon was recovered. G H

**[10]** At the end of the prosecution's case, the learned trial judge, after giving the evidence adduced the maximum evaluation, found there was a case to answer and called for the defence of the appellants. I

**[11]** The main defence of the first and second appellants was alibi. But the notice of alibi given by the second appellant did not comply with the requirements under s. 402A of the Criminal Procedure Code ('CPC'). The third appellant did not give the necessary notice of alibi. Each of them gave evidence on oath. The defence also called DW2 ('Zainah binti Akim') and DW3 ('Priscilla binti Jarawerd') as their witnesses.

**[12]** After hearing the defence the learned trial judge discharged and acquitted all the appellants.

**[13]** Basically his reasons were, *inter alia*:

(i) that the defence of alibi was established through DW2 and the court accepted it. There was no evidence adduced to indicate how the appellants went back to the place of murder after they went home;

(ii) that there was no evidence to incriminate the appellants to the murder. Even the forensic evidence adduced was of no help. None of the appellants suffered cuts or wounds as would seem to have been if based on the blood trail seen from the place of murder to the transformer station;

(iii) that there was doubt in the identification of the appellants by PW1. Even the photofits drawn based on the information given by PW1 did not resemble the appearances of the appellants. PW1 described one person he saw that night as having the hair style of the singer 'Sting' yet none of the appellants had such hair style at that time; and

(iv) that there was no evidence of common intention adduced by the prosecution. It was for the prosecution to prove its case beyond reasonable doubt.

**[14]** On appeal by the prosecution, the Court of Appeal unanimously reversed the decision of the learned trial judge.

**[15]** Briefly the reasons given by the Court of Appeal were thus:

(i) that it was not in dispute that the learned trial judge found a *prima facie* case against the appellants at the end of the prosecution's case; and

(ii) that it was against the weight of evidence and thus a misdirection by the learned trial judge when he sustained the defence of alibi of the appellants. A

**[16]** In their petitions of appeal the appellants raised several issues. B

**[17]** For the first appellant, his petition reads (verbatim), *inter alia*:

a. The Court of Appeal was wrong and erred in law when they allowed the appeal by the Respondent and/or overturned the decision of the Learned High Court Judge who discharged and acquitted the Appellants under s. 302 Penal Code; C

b. The Court of Appeal was wrong and erred in law and in fact in failing to consider that on the totality of the evidence adduced during the trial, the Learned trial Judge had made the correct findings on the failure to prove common intention, on the failure to take blood sample on the 1st Appellant to link him to the alleged crime and/or the defence of alibi which was supported or corroborated by Prosecution as well as defence witness, which His Lordship thereafter held that the Defence has raised reasonable doubts on the Prosecution's case and thereby acquitting and discharging the 1st Appellant on the charge of murder; D E

c. The Court of Appeal was wrong and erred in law and in fact in not accepting the defences of the 1st Appellant along the principles relating to consider all the evidence in its totality at the close of the defence and made a finding to overturn the decision of the High Court Judge who had discharged and acquitted the 1st Appellant under s. 302 Penal Code. F

**[18]** For the second appellant, his petition contained, (verbatim) *inter alia*: G

a. The learned Court of Appeal Judges in allowing the Pendakwa Raya appeal and/or by setting aside the learned trial Judge's order of acquittal and discharge of the 2nd Appellant on the charge of murder failed to appreciate: H

i. that the ingredients of murder, ie, *mens rea* and *actus rea* was not proven and/or the accused had raised reasonable doubt on the prosecutor's case at the conclusion of the whole trial. I

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ii. There was no cogent evidence at all that the 2nd Appellant and the other Appellants intended to murder the deceased and the learned trial Judge made a finding of facts that the Police had acted on the 2nd Appellant's notice of alibi;

B

b. The learned Court of Appeal Judges did not consider properly or at all in totality the evidence adduced during the prosecution stage and the defence stage which wholly supports the 2nd Appellant's defence;

C

c. The learned Court of Appeal Judges erred in law by concerning themselves only on the issue of alibi whereas the defence of the Appellants are not restricted to the issue of alibi only and furthermore, the Appellants evidence was positively supported by the testimonies of the prosecution witnesses;

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d. The learned Court of Appeal Judges failed to appreciate fully or at all that the circumstantial evidence relied upon by the prosecution which when considered properly with the other facts and evidence did not have the cumulative effect of bringing home the reasonable and irresistible inference that

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the 2nd Appellant had committed and/or was involved in the offence which he was charged;

e. The learned Court of Appeal Judges ought not to have disturbed the order of the learned trial Judge who had assessed the evidence in totality at the conclusion of the trial

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and had given benefit of the doubt to the 2nd Appellant which he was entitled to in law based on his finding of fact thereof;

f. The learned Court of Appeal Judges did not view the whole

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of the evidence objectively and from all angles especially the demeanors of the prosecution witnesses at the trial which had resulted in the 2nd Appellant's acquittal by the learned trial Judge based on the totality of the evidence given during the prosecution and defence's stage.

H

**[19]** For the third appellant, his petition stated these (verbatim), *inter alia*:

a. The Court of Appeal has failed to recognize that even though a *prima facie* has been established at the end of the prosecution case the trial judge is still duty bound to comply

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with s. 182A of the Criminal Procedure Code to re-evaluate the prosecution case and also to evaluate whether at the end

of the defence case, the prosecution has proved its case beyond reasonable doubt or the explanation of the defence has cast doubt on the prosecution case.

b. The Court of Appeal erred in failing to appreciate the defence of the 3rd Appellant is not one of alibi.

c. The Court of Appeal erred in finding the 3rd Appellant guilty of murder when the photo fit (EX. P47 (a)-(c)) is totally different from the physical identity of the 3rd Appellant on the night in question.

d. The Court of Appeal misdirected itself in failing to discharge its duty to consider a very strong and forceful submission regarding the complete difference of the photo fit and the physical identity of the 3rd Appellant despite the claim of PW1 that he had a good five minutes look at the Appellants.

e. The Court of Appeal misdirected itself when they failed to give reasons as to why the trial judge had misdirected himself (Rekod Rayuan Tambahan, page 2, para 3).

**[20]** However, before us the focus of the arguments were these:

(i) the prosecution failed to prove its case. In it the issue of identification was raised;

(ii) the defence of alibi;

(iii) the absence of forensic evidence linking any of the appellants to the crime;

(iv) the failure to prove common intention; and

(v) the tainted evidence, as it was alleged that some witnesses were coerced to implicate the appellants.

**[21]** Accordingly, we will proceed to consider each of the points relied upon during the arguments before us. We will not address them in the order as listed above as some are overlapping. And we will of course give our consideration of the other issues raised in the petitions of appeal.

## Had The Prosecution Proved Its Case?

**[22]** It is trite that being an appellate court it is our task in this case to review and consider the decision of the courts below. We need to determine whether on the evidence adduced the defence

A was rightly called. If so, whether the defence had raised a reasonable doubt in the prosecution's case. And even if it did not it is still essential that to sustain the convictions it must be determined whether the prosecution had proved its case beyond reasonable doubt.

B

**[23]** In his judgment, the learned trial judge correctly listed the elements required to be proved by the prosecution in order to establish a *prima facie* case. He said this:

> In order to establish a *prima facie* case in this murder trial, it is
> C incumbent upon the prosecution to prove;
>
> a. The death of the deceased, Welfred bin Thomas occurred on 26th day of May, 2001 at about 2am at 7Eleven Shop Donggongon Town, in the District of Penampang, Sabah;
>
> D b. The death of Welfred bin Thomas was caused by injury or injuries inflicted on the deceased;
>
> c. The accused had caused the injury or injuries which resulted in the deceased's death; and
>
> E d. The act of causing the death was committed with the *mens rea* under s. 300 (a), (b), (c) or (d) in furtherance of common intention under s. 34 of the Penal Code.

**[24]** In respect of elements (a) and (b), the learned trial judge
F rightly said this:

> Elements (a) and (b) above do not appear to have been disputed. According to the post mortem report prepared by Dr Philip Jayasuriya, the deceased Welfred bin Thomas was brought in dead and his body was identified by the deceased's mother, Nipe @
> G Dolma Binti Yadin (PW5). The death of the deceased was caused by multiple stab wounds as stated in the post mortem report at Exhibit P55.

**[25]** As for element (c), the learned trial judge summarised and considered the issues raised before him including the issue of
H identification of the appellants and thus correctly made his finding:

> In relation to the third element, the prosecution relied solely on the evidence of PW1 Osmund David who positively identified the three accused persons at the Identification Parades conducted on
> I 24th June, 2001 at a Police Station and again during the trial.

Learned counsel for the accused persons however argued that the evidentiary value of the evidence generated by the identification parade is merely for corroborative purposes. It was further submitted that the substantive piece of evidence is identification in Court but cautioned that such identification loses its value where there is evidence to show that the identification parade was conducted irregularly which would be unfair and prejudicial to the accused persons.

The defence however submitted that despite the positive identification of the three accused persons at an identification parade on 24th June, 2001 by PW1 and again he successfully identified them in Court, both identifications were of no evidentiary value and unsafe to be acted upon. Learned counsel therefore argued that there was no case to answer.

Notwithstanding the arguments ably put forward by both counsel for the defence there was the testimony of PW1 that he saw the three accused persons when they approached him at the cash register. PW1 alleged that he came face to face with the three accused persons for "five minutes" when they wanted to get the money found at the cash register. At that time, PW1 was stationed at the cash register. PW1 said he saw their faces.

I cannot brush aside and ignore the glaring testimony of PW1 who said he saw the faces of the three accused persons for five minutes in the 7 Eleven store at Donggongon on 26 May 2001 at 2 am. This was a positive identification of the accused persons.

Applying the guidelines in *Looi Kow Chai v. Public Prosecutor* [2003] 2 AMR 89; [2003] 1 CLJ 734 CA on to the facts of the instant case as well as what I have discussed earlier and after undertaking maximum evaluation, I found *prima facie* case has been established against the three accused persons and they were therefore asked to enter their defence ...

**[26]** Now, element (d) deals with *mens rea*. It is settled law that for the offence of murder the *mens rea* element can be imputed from the injuries inflicted upon a deceased.

**[27]** In *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 the then Federal Court said this at pp. 176, 177:

The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

A

...

In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased.

B

**[28]** And in *Tan Buck Tee v. PP* [1961] 1 LNS 130; [1961] MLJ 176 Thomson CJ at p. 179 also said this:

C

There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

**[29]** Accordingly, in the present case the learned trial judge did D not doubt the competency of the pathologist who conducted the post mortem on the body of the deceased and prepared the report tendered as exh. P55. In the post mortem report, the cause of death of the deceased was due to 'multiple stab wounds'. In fact there were 12 stabs inflicted upon the deceased. Plainly therefore, the E presence of *mens rea* for the offence of murder can plainly be inferred in this case.

**[30]** On the issue of s. 34 the learned trial judge made a short reference to it when concluding his judgment. He said this:

F

The prosecution failed to prove common intention under s. 34 of the Penal Code. "Under the provisions of s. 34 the essence of the liability is to be found in the existence of a common intention animating (sic) the accused leading to the doing of a criminal act in furtherance of such intention." (see *Sabarudin bin Non & Ors v. Public Prosecutor* [2005] 4 MLJ 51 per Gopal Sri Ram JCA.

G

**[31]** Unfortunately the learned trial judge did not consider the issue before calling for the defence. Despite such oversight, we do not think we are prevented from considering the issue based on the evidence adduced.

H

**[32]** It is settled law that under s. 34 when a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the manner as if it were done by him alone. In other words if two or more persons I intentionally do a thing jointly it is just the same as if each hand

has done it individually. There is no requirement of proof that any particular accused was responsible for the commission of the offence.

**[33]** In *PP v. Dato' Mokhtar Hashim & Ors* [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 at p. 749; [1983] 2 MLJ 232 Hashim Yeop A Sani J (as he then was) at p. 268 said this:

> Thus it is clear that the leading feature of s. 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of s. 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence.

**[34]** In the present case there was the evidence of PW1 who testified that he saw the appellants entering the store together. Subsequently, the first appellant chased and attacked the deceased while the second and third appellants attacked him. Obviously they went into the store with common intention to commit an offence that led to the murder of the deceased. As they were together at the time of the commission of the murder they were all liable for the offence regardless which of them did the attack that led to the death of the deceased.

**[35]** The learned trial judge did not indicate his expectation from the prosecution in order to satisfy the requirement of s. 34. But it should be borne in mind that '... Direct intention of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused.' per Syed Agil Barakbah SCJ at p. 344 in the case of *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 at p 251; [1987] 2 MLJ 336.

**[36]** Hence, on the facts and evidence adduced in this case we are satisfied that had the learned trial judge considered the evidence on this issue at the end of the case for the prosecution and upon giving them the maximum evaluation he would have found that the ingredients of s. 34 had been duly established and proved.

**[37]** Accordingly we are satisfied that the defence was rightly called by the learned trial judge at the end of the prosecution's case.

## The Defence

**[38]** We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.

**[39]** In *PP v. Khong Soh* [1966] 1 LNS 141; [1966] 2 MLJ 137 Macintyre J said this at p. 139:

> Having held that a *prima facie* case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind.

**[40]** Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focused on whether the defence had cast a reasonable doubt in the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.

**[41]** In the instant case the first and second appellants relied on the defence of alibi while the third appellant denied committing the offence as charged and argued that the prosecution had failed to establish the identity of any of the appellants. In fact in their petitions of appeal and in the submissions of their learned counsel before us, the same issues were canvassed.

**[42]** Accordingly in considering their appeals before us we will address the two issues, namely:

(i) identification; and

(ii) alibi.

## (i) Identification Of The Appellants

**[43]** The identification of the appellants had been duly considered by the learned trial judge in his deliberation before calling for the defence. He made his factual finding. And unless at the defence stage there was evidence adduced which cast a reasonable doubt in the prosecution's case or that the appellants could show from the evidence adduced by the defence that the finding on identification was flawed, such finding should not be simply overturned by an appellate court.

**[44]** In this present case as indicated above the learned trial judge accepted that the appellants were positively identified by PW1. He said this:

> I cannot brush aside and ignore the glaring testimony of PW1 who said he saw the faces of the three accused persons for five minutes in the 7Eleven store at Donggongon on 26 May 2001 at 2 am. This was a **positive identification** of the accused persons. (emphasis added).

**[45]** But despite his factual finding of positive identification of the appellants by PW1, the learned trial judge subsequently reversed himself at the end of the whole case. And he did it even though the defence had not adduced any evidence to rebut the positive finding on their identification.

**[46]** Upon our review of the evidence and the relevant legal principles we are of the view that the learned trial judge erred in reversing his initial finding on the identification of the appellants by PW1.

**[47]** To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v. Turnbull & Ors* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v. PP* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras. 33-35 of the judgment:

> Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is **whether the**

**case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the Defence to be mistaken.**

**If so**, the second question should be this. **Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made?** A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence.

**Where the quality of the identification evidence is poor**, the judge should go on to ask the third question. **Is there in any other evidence which goes to support the correctness of the identification**. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. **What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.** (emphasis added).

We agree with the summary of the guidelines.

(See also: *Zulkifli @ Sakun Ahmad Endin Chun lwn. PP* [2012] 1 LNS 435; [2013] 1 MLJ 733; *Dorai Pandian Munian & Anor v. PP* [2012] 10 CLJ 22; [2009] 4 MLJ 525).

**[48]** No doubt the learned trial judge did not make reference to the *Turnbull* guidelines in coming to his initial finding. But we find that based on the notes of proceeding it is clear that in effect the

elements of the guidelines were taken into account. As such his failure to make an express reference to the guidelines has not prejudiced the defence.

**[49]** It should be noted that at the end of the case for the prosecution the learned trial judge ruled that the appellants had been positively identified by PW1. He must have been satisfied with the accuracy and good quality of the identification. He relied on the fact that PW1 had a good five minutes look at the faces of the appellants that early morning. PW1 also testified that he saw the first appellant chasing the deceased into the store room and after coming out from the store room the first appellant went on to attack him.

**[50]** The other contributing factors to the good quality of the identification of the appellants are these:

(i) that those who entered the store that early morning did not wear masks;

(ii) that the lighting in the store at that time was bright;

(iii) that the two persons who pointed parangs on the abdomen of PW1 must have been very near him. PW1 gave the length of the parangs to be about a foot (12 inches);

(iv) that the view of PW1 on those who entered the store that early morning was not impeded or obstructed;

(v) that it was not a fleeting glance of PW1. (See: *PP v. Hanif Basree Abdul Rahman* [2007] 2 CLJ 33; [2007] 2 MLJ 320; *PP v. Shafarin bin Zainal Abidin & Anor* [2007] 7 MLJ 474; *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269; [2006] 4 MLJ 134).

(vi) that in his evidence PW1 was positive that the appellants were the ones who came into the store on that fateful early morning. Under intensive cross-examination PW1 remained steadfast in his answers on his identification of the appellants;

(vii) that being the appellate court we do not think we should interfere with the assessment by the learned trial judge of PW1 as a witness on the issue of identification of the

A appellants or overlooked it. (See: *Syed Abdullah v. PP* [1963] 1 LNS 133; [1964] MLJ 48; *Ye Wei Gen v. PP* [1999] 4 SLR 101, at pp. 107–108 (HC));

(viii) that PW1 had no reason or motive to simply implicate the
B appellants; and

(ix) that the IP was also conducted within a month after the incident.

**[51]** Learned counsel for the appellants strenuously submitted on
C the discrepancies in the actual appearances of the appellants in court and as described by some of the witnesses called to testify and the photofits composited by PW14 ('Marius bin Denis') based on the descriptions given by PW1 on 30 May 2001.

D **[52]** However, it must be appreciated that the main purpose of a photofit is usually to help in the investigation of a crime. It is more to assist in trying to identify potential suspects than for use in a criminal trial. The fact that a photofit is unlike a photograph or video, which is real evidence, means that little weight should be
E attached to its use as a means of identification evidence in a court of law. It is at best an aid to a criminal investigation. In fact, in this case it was the evidence of investigation officer PW12 ('Chief Inspector Rosdianah bte Rashindin') that the photofits were not relied upon to arrest the appellants. It was based on the
F information given by PW17 ('Lowryn bin Sabin'), PW18 ('Ng Siau Hui') and DW3 ('Priscilla binti Jarawerd').

**[53]** The accuracy of a photofit depends very much on the ability of the person doing the sketch or composite in relation to what is
G being described to him. In fact PW14 testified that he had no formal training in doing photofit and it was the first time he was called to give evidence in court. He went on to say that a photofit should only be taken as a guide. He spent about an hour with PW1 on 30 May 2001. He did not know how to draw. He
H used a computer to get PW1 to identify the hair, eyes and ears. He said that the process was not accurate.

**[54]** After he had completed the task with the help of a photographer PW14 gave the photofits to PW12 ('Rosdianah bte Rashindin') on 24 June 2001.

I

**[55]** It should also be noted that PW1 did not describe any peculiar features of the appellants. According to PW14 the description given to him by PW1 for one of the attackers that early morning was that the person was sporting the hairstyle of the singer 'Sting'.

**[56]** It was thus submitted that the descriptions of the persons PW1 saw that early morning and the actual appearances of the appellants during the IP and in court did not match.

**[57]** But as discussed above we do not think much should be made out of the photofit issue. Hairstyles can be changed after a lapse of time. (See: *R v. Ryan* [1990] Crim LR 50). Indeed it can even be used to disguise or mask a person's appearance. (See: *S v. Charzen* (2006) SCA 6 (South Africa Supreme Court)). In the present case there was a lapse of a month before the appellants were apprehended.

**[58]** Further, much was made out of 'Sting' hairstyle. Yet there was no evidence adduced and no one came to describe the actual look of a 'Sting' hairstyle so as to indicate the stark difference from a person who has a short hair with gel applied. This is the evidence of PW17 ('Lowryn bin Sabin') while under cross-examination by learned counsel for the third appellant:

Q: Rambut Duis Akim pada malam itu, adakah rambutnya seperti rambut penyanyi 'Sting'?

A: Tiada

Q: Apa bentuk rambutnya?

A: Macam biasa sajalah, pendek

**[59]** Thus, the first appellant did have short hair at that time. Looking at the hair of the photofit it is clear that the pre-requisite is short hair. Applied gel and surely the short hair would appear to stick up.

**[60]** Further, it should also be appreciated that PW1 was made to describe his assailants on 30 May 2001 (the attack was on 26 May 2001) while he was still recovering from his injuries and according to him he was in pain. Under such circumstances PW1 could not be expected to give the finer details on his assailants.

**[61]** In fact when he was recalled PW1 readily and freely admitted that the photofit did not really depict of how the first appellant appeared during the IP. Such a stance should be considered in his favour instead of using it to paint him as not a credible witness and thus making the quality of his evidence poor for identification.

**[62]** As such we think the learned trial judge gave too much weight to the apparent inconsistent descriptions in the photofits of the appellants. He said this:

> Related to the question of identification is the question of the "photo fit" prepared by the Police based on the information given by PW1. None of the photo fits resemble any of the three accused persons. Again doubts as to the identity of the accused persons persists.

**[63]** With respect, the learned trial judge had the photofit before him at the end of the prosecution's case and before he called for the defence. He did not find such photofit to have contradicted the positive identification of the appellants by PW1.

**[64]** Thus, to recap, we note that PW1 was positive that those he saw on that early morning of 26 May 2001 were the appellants. He did not waver even under intense cross-examination by defence counsel for the appellants.

**[65]** And we agree with the initial finding of the learned trial judge that PW1 was a credible witness. If indeed PW1 was purely guessing on the identities of his attackers that early morning he would have also picked up PW17 (Lowryn bin Sabin), PW18 (Ng Siau Hui) during an identification parade conducted by Chief Inspector Mohd Zunaidi Junuh. (See: exhs. P52 and P53). He did not do so. Surely that should enhance his credibility.

**[66]** It should also be noted that the arrest of the appellants was not the result of pure guesswork. It was the evidence of PW12 that it was PW1 who gave her the lead. He suspected DW3 had something to do with the incident. And unknown to PW1, indeed DW3 and her companion including the appellants came to the vicinity of the store that night.

**[67]** And although it was submitted before us that PW1 was shown photographs of the appellants during the IP, such assertion was not pursued during the trial. Learned counsel for the first and second appellants did not cross-examine PW1 on that point. And

in his answer to questions from learned counsel for the third appellant, PW1 initially admitted being shown photographs of the appellants in the morning of 24 June 2001, that is, the day the IP was conducted. But during re-examination and upon recall, PW1 corrected himself and said that he was shown only the photofits. And he said that the police did not bring him to see the appellants at any time before or during the IP. In fact PW1 was affirmative in saying that even without seeing the photographs of the appellants he could still identify them.

**[68]** Accordingly, we are of the view that the learned trial judge erred in relying on the non-resemblance of the photofits to any of the appellants in order to cast doubt in the credibility of PW1 when he said this:

> However, as was readily admitted by PW12, these photo fits do not resemble any of the three accused persons. The fact that PW1 when recalled later to give evidence admitted that the said photo fits do not really resemble the accused persons can only point to one thing: that is the credibility of PW1 as a witness.

*The Identification Parade*

**[69]** The first IP was conducted in the afternoon of 24 June 2001 starting from 3pm and completed at about 3.35pm under the supervision of PW10 ('Chief Inspector Ahmad Zaki Haji Abdullah'). At the start of the IP, PW10 briefed PW1 on the procedure. He also explained to the other participants and informed the first appellant of his rights such as his free choice of position in the parade and that he could change his clothes. According to PW10, on the first round, PW1 looked at those paraded and when he came to the first appellant he stopped and looked at the first appellant but did not touch him as required. In our view such precaution taken by PW1 to identify the first appellant should confirm that he did not simply implicate the first appellant and did so only when he was very sure. If he had seen the photograph of appellants as alleged by the defence he could have immediately pointed out the first appellant even during the first round of the IP.

**[70]** While waiting for the second round of the IP to begin, PW1 was taken back to the CID office accompanied by Cpl. Lawrence Leonard. It was during the second round of the IP that PW1 touched the first appellant, thus signifying his confirmation of having identified the first appellant.

**[71]** And before the third round of the IP began, PW1 was again taken back to the CID office to wait. During the interval, PW10 informed the first appellant that he could change his position in the parade and also his clothes with the other participants of the parade. On the third round of the IP, PW10 said that PW1 again identified the first appellant by touching him. Under cross-examination, PW10 said that PW1 did not see the appellants before the IP. PW10 also said that upon completion of the IP he prepared a report that was admitted as an exhibit without any objection from learned counsel for the appellants.

**[72]** There was also a suggestion to PW10 that PW7 ('Cpl. Petros') told PW1 not to be scared but just point the first appellant. PW10 answered that he did not know of such happening. With respect, if indeed learned counsel for the first appellant was serious on the issue PW1 should have been cross-examined about it while he was in the witness box. To put such a question to PW10 was not only unfair to him but also to PW1.

**[73]** The IP for second and third appellant was conducted by PW11 ('Chief Inspector Rosdi bin Mat Jusoh'). It was also held on 24 June 2001 starting from 3.45pm PW11 explained that no IP for all the appellants was done simultaneously because there was only ten participants called for the IP of the first appellant while there were 15 participants for the IP of the second and third appellants.

**[74]** The IP for the second and third appellants was also on the basis of three rounds. According to PW11 on each round PW1 identified the second and third appellants by pointing and touching them. Before the second round the second and third appellants opted to change their positions in the lineup but not their clothes. PW11 also testified that he did not know whether photographs of the appellants were taken before the IP. And he did not know if PW1 was shown the photographs of the appellants before the IP. Again we would say that learned counsel for the appellants did not put such suggestion to PW1 and PW7 when they were in the witness box. Such failure in our view had made such allegation an afterthought on the part of the defence. (See: *Hamidon Mat Yatim v. PP* [1995] 3 CLJ 724).

**[75]** After the IP, a report was prepared by PW11 that was admitted as an exhibit without objection by learned counsel for the second and third appellants.

**[76]** From the evidence adduced on the conduct of the IP as summarised above, we find that there was therefore no basis and indeed, with respect, was factually and evidentially an error for the learned trial judge at the end of the whole case to come thus to his finding:

> The prosecution's case was a mere concoction built on doubts and conjectures. It started with the testimony of PW1 who claimed that he saw the faces of the three accused persons for 5 long minutes at the cash register. Yet, he was the same person who could not recognise the three accused persons during the Identification Parade. It is in evidence that he went round them more than thrice and yet he could not identify them. PW1 could only identify them upon being allegedly shown photographs of the three accused persons when he went back from the first few rounds of Identification Parade into a room at the Police station.

**[77]** In fact, on closer perusal of the evidence of PW7 ('Corporal Petros @ Alam bin Runsab') there was no reference of photographs of the appellants taken by him for 'remembrance'. Indeed he was not even cross-examined on the issue. PW7 only photographed the appellants upon their arrest and that was a procedural requirement. Thus there is also no basis for the learned trial judge to thus remark in his judgment:

> There was suggestion by the defence that identification could only be made when PW1 was shown photographs of the three accused. Testimonies were made in Court by the three accused persons that photographs were taken of them were taken twice. One was an official photograph following proper procedure with the registration number while on another occasion it was taken for "remembrance" said by Cpl Petrus @ Alam bin Runsab (PW7). The said PW7 has not denied having done so.

PW7 could not be expected to deny a matter that he was never confronted in the first place when he was in the witness box.

**[78]** PW7 and PW1 were also not cross-examined by learned counsel for the appellants on their allegation that PW7 had told PW1 'jangan takut, pegang saja dialah tu' (Do not be afraid, just touch that's him) or words to that effect. Again we would say that such failure would strongly indicate that such allegation was just an afterthought.

**[79]** Thus, having considered the evidence adduced on the identification of the appellants in the light of the *Turnbull* guidelines we are satisfied beyond reasonable doubt that the appellants had

A been positively identified as the persons involved in the killing of the deceased. In coming to this finding we also bear in mind the *dicta* of Azlan Shah J (as His Highness then was) in the case of *K S Roberts v. PP* [1970] 1 LNS 44; [1970] 2 MLJ 137 (HC) at p. 138:

B

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfills the definition of the word 'proved' given in s. 3 of the Evidence Ordinance. The evidence of identification is as much
C subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is
D so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

(See also: *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613).

E

**[80]** And it is noteworthy what was said in *Thirumalai Kumar v. PP* [1997] 2 SLR(R) 266 by Yong Pung How CJ (S'pore) at para. 33:

> F The central issue is the extent of prejudice or unfairness caused by any procedural breach or defect. A breach of the procedural requirements in holding an identification parade does not lead automatically to inadmissibility: *R v. Jones (Terrence)* [1992] Crim LR 365 and *R v. Ryan* [1992] Crim LR 187. Provided the parade is conducted fairly, a failure to comply strictly with instructions in
> G the parade book or other police orders need not be fatal: *R v. Mei* (1989) 4 CRNZ 580. On the other hand, where there is evidence of bad faith or a "deliberate flouting" of procedural requirements rather than mere inefficiency, the identification will probably not be upheld: *R v. Finley* [1993] Crim LR 50.

H **(ii) The Alibi Defence**

**[81]** As indicated above only the first and second appellants relied on alibi as their defence.

I **[82]** However, alibi could not prevail over the positive identification of an accused person especially so in the face of categorical statements coming from credible witnesses who had no ill motives in testifying.

**[83]** Thus, in *Mutachi Stephen v. Uganda* ([2003] UGCA 9) the accused said that on the night the offence took place he was already asleep with his wife. However, there was a witness who had positively identified him. As such his alibi collapsed. He has been squarely put at the scene of crime. A

**[84]** Similarly in the present case it was the finding of the learned trial judge, which we agree, that the appellants had been positively identified by PW1. As such, the alibi defence of the first and second appellants collapsed. And since the third appellant did not rely on alibi it was therefore not relevant to him. Yet the learned trial judge appeared to have also allowed the defence of alibi for the third appellant. B C

**[85]** Interestingly, we note that all the appellants claimed to be together that night yet the third appellant did not find it necessary to plead alibi as his defence. And it should also be noted that a senior counsel represented him right from the beginning of the case. Basically his defence was one of bare denial. But upon being positively identified his denial collapsed as well. D

**[86]** Accordingly, for the above reasons there is no necessity for us to deal with the alibi defence but merely to consider whether the prosecution had established its case beyond reasonable doubt in order to uphold the convictions of the appellants. E

**[87]** However, for completeness and since the learned trial judge concluded that the 'defence of alibi is accepted by this court' we now examine if such conclusion is supported by the evidence adduced. F

**[88]** The reasons given by the learned trial judge for his conclusion may be summarised as follows: G

(i) the evidence of DW2;

(ii) 'no evidence adduced by the prosecution to show that the accused persons went to the scene of crime after they returned home at 1am'; H

(iii) PW18 (Ng Siau Hui) testified that he sent the appellants home 'and after sending them back he went home and the van was at his house as he did not go out again'; I

(iv) not an iota of evidence 'adduced by the prosecution to show how the three accused persons went to' the store. There was no evidence on the transport they used;

A (v) the chemist PW8 testified that no trace of blood found inside the van. The van was dry. Since there was blood trail from the door of the store to the electrical transformer at the back it would indicate that the assailants were injured. But none of the appellants suffered injury; and

B

(vi) no traces of blood on the clothes of the appellants.

**[89]** With respect, we would say that most of the reasons mentioned by the learned trial judge did not take into account certain facts. For instance, in reasons (v) and (vi) above the C learned trial judge ignored the fact that the appellants were only apprehended about a month after the incident. There would have been more than sufficient time to clean up whatever traces of blood and healing of wounds if any. However, in this case PW12 in answer to a question during her re-examination said that no D blood samples were taken from the appellants as PW1 told her that none of them were injured during the incident. Upon their arrest bodily examinations were also conducted. Hence, reason (v) is presumptuous. As such those reasons should not be taken to support the defence of alibi.

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**[90]** As for reasons (ii) to (iv) they were merely evidence intended to support the defence of alibi. They should not be accepted as the truth without due analysis. They had to be considered in the light of the overall evidence. And although the evidence of PW18 F (Ng Siau Hui) was before the learned trial judge at the close of the case for the prosecution he called for the defence after giving the evidence the maximum evaluation. Obviously therefore, he did not believe or gave much weight to the testimony of PW18. To rely on it subsequently and accepting it as the truth without more G in order to support the defence of alibi plainly ignored the other evidence which he accepted when calling for the defence.

**[91]** Further, in this case it was not in dispute that the appellants with four others went to the vicinity of the store on the night of H the murder. All gave the same reason for going there, that is, at the behest of DW3. But they said that they were there earlier and before the alleged time of the murder. By that time they claimed to be already in their respective homes. It was therefore mainly a question of time and not that the appellants were never I in the vicinity of the store.

**[92]** Now, the following legal principles on the defence of alibi are relevant in the present namely: A

(i) 'the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission'. (See: *Regina v. Youssef* (1990) 50 A Crim R 1 at pp. 2-3); B

(ii) the correct 'approach to be adopted in regard to an alibi defence, ... *is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt'*. (See: *Leve v. S* (CA & R 163/12) [2013] ZAECGHC 5 (31 January 2013) (South Africa). (emphasis added); C D

(iii) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true'. (See: *R v. Hlongwane* 1959 (3) SA 337); E F

(iv) "(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. *The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false." (See: S v. Liebenberg 2005 (2) SACR 355 (SCA)*. (emphasis added); G H

(v) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime'. (See: *Mutachi Stephen v. Uganda* (*supra*). The evidence of his alibi need only raise a reasonable doubt that he committed the crime. (See: *Lizotte v. The King*, 1950 Can LII 48 (SCC), [1951] SCR 115); and I

A (vi) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (See: *R v. Letourneau* [1994] BCJ No. 265 (QL) (CA), 61).

**[93]** In coming to his conclusion on the alibi defence the learned
B trial judge appeared to have entertained the evidence of DW2 (Zainah binti Akim) and the evidence on oath of the appellants. He found that such testimonies were corroborated by PW16 (Paulina binti Moringding), PW17 (Lowryn bin Sabin), PW18 (Ng Siau Hui) and DW3 (Priscilla binti Jarawerd). The learned trial
C judge also said that their testimonies were neither challenged nor impeached by the prosecution.

**[94]** However, we note that in coming to his finding on those witnesses the learned trial judge did not indicate his reasons for believing their testimonies. He appeared to have accepted their
D versions wholesale without any reservation. He did not consider that those witnesses were with the appellants that fateful night while DW2 is the sister of the first appellant.

**[95]** With respect, the least the learned trial judge could have
E done was to juxtapose their testimonies to the overall evidence before him. He should have also stated his reasons for believing their version. Since that was not done we now examine the evidence adduced to determine if indeed the conclusion of the learned trial judge could be upheld.

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**[96]** On close scrutiny of their evidence there were glaring discrepancies. Their accounts contradicted or differed in certain crucial and material particulars especially on the time factor which was the core of the alibi defence.

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**[97]** Each of them gave quite a disparity in time of arrival home that night. For instance:

(i) the first appellant testified that they left Kampong Keramat for the store, that is, the 7 Eleven at Donggongon at about 11pm
H or coming to 12am. Then they spent about one hour at Tanjong Aru before going home arriving at about 1am. The second appellant mentioned of the same time of arrival. Both also said that they were sure of the time since the television program was still being transmitted when they arrived;

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(ii) the third appellant did not know what time they arrived at Donggongon. He was not wearing a watch. But he disagreed with the first appellant that they returned to Kampong Keramat at about 1am;

(iii) PW16 gave the time of returning to Kampong Keramat at about past 12am and then she brought DW3 to visit her nearby friend by the name of David until about 1am. They went home past 1am;

(iv) PW17 testified that they left Tanjong Aru around 12am but was not specific of his time of arrival home. Yet PW18 said that they arrived at Kampong Keramat around 12am;

(v) DW3 gave the time of going to Donggongon at about 11pm and spent about one hour at Tanjong Aru. Then they went back to Kampong Keramat arriving there at about 1am; and

(vi) DW2 in her evidence said that the first and second appellants arrived home past 12am. She said that if they came back before 12am she would not reprimand them. But that night they came back past 12am. She waited for them until past 12am. Since there was no sign of them she therefore went to bed. Her usual sleeping time was between 10pm and 11pm.

**[98]** Thus, amongst the abovementioned witnesses there were uncertainty and discrepancy in the time of returning to Kampong Keramat that night. We would say that none of the witnesses appeared to know or told the truth of their arrival time that night. But if indeed the evidence of DW2 were to be relied upon it could be deduced that the first and second appellants must have arrived home much later than 1am.

**[99]** DW2 said that she waited for the first and second appellants past 12am forgoing her usual sleeping time of between 10pm and 11pm. When they did not arrive she was not happy. She went to bed. Then she heard them arriving and she went to open the door. She said it was late in the night. She said that she was sure it was past 12am. And she was sure that they did not leave home again as they were asleep when she went to the toilet before 4am that morning which according to her was about an hour after their arrival.

**[100]** Thus, going by the estimated time DW2 gave it was obvious that the first and second appellants must have arrived home much later than the time they gave. As such their denial of being in the vicinity of the store when the murder happened could not be sustained.

**[101]** Alternatively, since the time of arrival home given by the appellants and their witnesses were conflicting, none could be accepted as correct. And in the face of the positive identification of the appellants by PW1 their alibi defence or denial just could not stand.

**[102]** Further, having analysed the evidence of DW2 in the light of the other relevant evidence before the court we find that it cannot stand for the following reasons:

(i) DW2 claimed to have opened the door for the first and second appellants. But there was no indication of how she came to know they were at the door. The second appellant said that he did not hear the first appellant knocking the door or the doorbell to alert DW2 of their arrival;

(ii) In fact the second appellant did not even know who opened the door let alone being reprimanded by DW2 as she claimed when they arrived home past 12am;

(iii) The first appellant was sure of the time as the television transmission was still on but DW2 did not mention about it at all. She said that she went to bed after waiting for them past 12am. Thus, either one or both were not telling the truth;

(iv) DW2 in her evidence appeared to have had a very selective memory of events preferring to say she could not remember when it suited her. Further, despite not having looked at a clock, DW2, when it suited her, was adamant on the time. Obviously she was a very biased witness for the appellants;

(v) DW2 was not even certain what time she went to bed on 25 May 2001. She said she waited for the first and second appellants until past 12am before going to sleep. But she also agreed that she went to sleep according to her usual bedtime of between 10pm and 11pm. This was indicative that she was not a truthful witness;

(vi) It should also be noted that she was present in court when the first appellant gave his evidence. Yet the learned trial judge found that it was her evidence that established the alibi defence of the appellants. Caution should have been taken before accepting her evidence wholesale; and

(vii) DW2 admitted that the first appellant was her responsibility and she would do anything to protect him. Surely such admission should cast serious doubt on her loyalty to the truth.

**[103]** Accordingly and with due respect the learned trial judge was too lenient when he accepted the testimony of DW2 as having established the alibi defence.

**[104]** In fact when the evidence of DW2 was cast aside, the appellants' defence was one of mere denial. Juxtaposed that denial to the positive identification by PW1 and it was clear that such denial was bare. It was further undermined by the material discrepancies in the evidence of the appellants and the witnesses who gave evidence in their favour.

**[105]** For instance, as between the evidence of the first appellant and the second appellant the latter appeared not to know or even remember the critical events related by the first appellant on arriving home. They were together at that time. The second appellant testified that he did not know who opened the door. He did not hear the first appellant knocking the door. Yet DW2 said that she would always open the door for them upon their return from night out which were frequent as they had many friends. This also indicated that the claim by DW2 of opening the door that night could not be believed.

**[106]** Other obvious contradictions were found in the evidence of DW3. There were as follows:

(i) She said that at Tanjong Aru PW16 was singing while one of the men was playing the guitar. None of those who went to Tanjong Aru ever mentioned such an event;

(ii) And while PW16 said that they arrived at Kampong Keramat around 12am. DW3 said that they arrived at 1am from Tanjong Aru;

A (iii) DW3 story contradicted PW16 evidence who said that on arrival at Kampong Keramat they went to visit her friend David until past 1am before going back to her house; and

(iv) PW16 said that she came to know of the murder from DW3 who told her that the boss of the store called all staff about the murder. This version could not be true as DW3 in her own evidence said that she did not work at the store and she bluffed her way to be sent to Donggongon that night.

C **[107]** Obviously DW3 had a different version of the event that night. Either all were or that DW3 was not telling the truth. Whichever it was the result was the same. It had undermined the appellants denial of involvement in the murder of the deceased.

D **[108]** One other point. The second appellant even went to the extent of alleging that there was a fight between the deceased and PW1 over DW3. But in her evidence DW3 denied being the girlfriend of PW1 and that she did not know the deceased. Again this contradiction merely served to further weaken the defence.

E **Conclusion**

**[109]** Having therefore analysed and considered the defence and the evidence adduced as a whole in this case we find that the defence had not cast a reasonable doubt in the prosecution's case. We find that the prosecution had proved its case beyond
F reasonable doubt.

**[110]** We have also considered the other issues raised by the appellants in their petitions of appeal. However, our findings on those issues do not alter our conclusion hereinabove.

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**[111]** These appeals are therefore dismissed and we hereby affirm the convictions and sentences as ordered by the Court of Appeal.

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